87-1573

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIE B. KILGORE, DORIS McCONNELL
AND PATSY BURCHETT,

Cross-Petitioners,

V.

COMMONWEALTH OF VIRGINIA, ex rel.
STATE BOARD OF ELECTIONS,
KATHERINE JONES McCLELLAND,
FAYE OWENS, ROGER ADAMS, EVELYN BACON,
PHILLIP CHEEK, the COUNTY OF LEE, VIRGINIA,
the COUNTY OF SCOTT, VIRGINIA, the REPUBLIC
INSURANCE COMPANY, and the COMPASS INSURANCE
COMPANY,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHEN INSURANCE EXISTS TO COVER A LOSS AND THE STATE BEING SUED ACQUIESCED TO A RULING THAT BACK PAY WAS RECOVERABLE, DOES THE ELEVENTH AMENDMENT STILL BAR THE AWARD OF MONETARY RELIEF TO INDIVIDUALS WRONGFULLY DISCHARGED FROM THEIR EMPLOYMENT?

II. AFTER THE ESTABLISHMENT OF THE BRANTI TEST FOR PATRONAGE DISCHARGES, CAN A COURT GRANT QUALIFIED IMMUNITY TO AN EMPLOYER WHO DID NOT EVEN ASSERT THAT PARTY AFFILIATION WAS A NECESSARY JOB REQUIREMENT JUST BECAUSE NO PRECEDENT INVOLVED THE FIRINGS OF VOTER REGISTRARS AND ASSISTANT REGISTRARS?

III. ARE VOTER REGISTRARS AND ASSISTANT REGISTRARS STATE EMPLOYEES WHEN THE VIRGINIA GENERAL ASSEMBLY ESTABLISHED A BIFURCATED SYSTEM WHERE BOTH STATE AND LOCAL GOVERNMENTS EXERCISE CONTROL?

LIST OF PARTIES REQUIRED PURSUANT TO SUPREME COURT RULE 21.1(b)

The appellants in the court below were Scott County Electoral Board members Katherine McClelland, Faye Owens and Herman Stallard; Lee County Electoral Board members Roger Adams, Evelyn Bacon and Judy Carroll; Lee County General Registrar Phillip Cheek; the Commonwealth of Virginia, ex rel. State Board of Elections; and the Compass Insurance Company.

The appellees in the court below were Willie B. Kilgore, Doris McConnell and Patsy Burchett (plaintiffs in the district court). The remaining parties who were appellants/ appellees in the court below were the County of Lee, Virginia; the County of Scott, Virginia; and the Republic Insurance Company.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

WILLIE B. KILGORE, DORIS McCONNELL
AND PATSY BURCHETT

CROSS-
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STATE BOARD OF ELECTIONS,
KATHERINE JONES McCLELLAND,
FAYE OWENS, ROGER ADAMS, EVELYN BACON,
PHILLIP CHEEK, the COUNTY OF LEE, VIRGINIA,
the COUNTY OF SCOTT, VIRGINIA, the REPUBLIC
INSURANCE COMPANY, and the COMPASS INSURANCE
COMPANY

CROSS-
RESPONDENTS.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Cross-Petitioners Willie B. Kilgore, Doris McConnell and Patsy Burchett respectfully cross-petition this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit for the following reasons.

REFERENCE TO OPINIONS

The opinions and orders of the United States District Court for the Western District of Virginia, Big Stone Gap Division, are reported at 637 F. Supp. 1241 (W.D. Va. 1985); 637 F. Supp. 1249 (W.D. Va. 1985); and 637 F. Supp. 1253 (W.D. Va. 1986). See also Petitioner's Appendix, "P.A.", at A-27.

The opinion of the United States Court of Appeals for the Fourth Circuit affirming in part and reversing in part the district court's judgment is reported at 829 F.2d 1319 (4th Cir. 1987). See also P.A. at A-1. The order denying plaintiffs'/appellees' Petition for Rehearing and Suggestion for Rehearing En Banc was filed November 19, 1987. See P.A. at A-25. The order of the United States Court of Appeals for the Fourth Circuit denying temporary injunctive relief is set forth verbatim in Cross-Petitioners' Appendix, "C.P.A." at A-1.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered the order denying plaintiffs'/ appellees' Petition for Rehearing and Suggestion for Rehearing En Banc on November 19, 1987.

This Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit is filed under Supreme Court Rule 19.5, and reliance is hereby made upon that rule. The Respondents and Cross-Petitioners Kilgore, McConnell and Burchett are filing this Cross-Petition in connection with the Petition for Certiorari filed by the Petitioner, Commonwealth of Virginia, ex rel. State Board of Elections, No. 87-1424. Kilgore, McConnell and Burchett received the Petition for Certiorari on February 18, 1988.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are set forth verbatim in P.A. at A-70: Constitution of the United States - Amendment I; Va. Code §§ 24.1-29, 24.1-30, 24.1-32, 24.1-35, 24.1-43, 24.1-44, 24.1-45, 24.1-45.1, 24.1-46, 24.1-49, 24.1-55.1, 24.1-55.2, 24.1-56, 24.1-105, 24.1-106, 24.1-203, 24.1-228.1, 24.1-229, 24.1-230, 24.1-231, 24.1-232.

These additional constitutional provisions and statutes are set forth verbatim in C.P.A. at A-13: Constitution of the United States - Amendment XI; Va. Code § 24.1-19.

STATEMENT OF CASE

On March 1, 1983, Republicans Willie Kilgore and Doris McConnell served as General Registrar of Voters in Scott County and Lee County, Virginia, respectively. Pasty Burchett served as Assistant General Registrar in Lee County. McConnell had ten years experience as general registrar while Kilgore had four years experience.

Local county electoral boards appoint the general registrar and in turn, the general registrar appoints the assistant registrar. Va. Code §§ 24.1-43 and 24.1-45.

When the Democrats gained control of the governorship in 1982, composition of the local boards was set to change from a Republican majority to a Democratic majority. In March of 1983, Kilgore and McConnell also were scheduled for reappointment.

The Republican board's term expired "on" March 1, 1983 and Virginia law required the

appointment of a general registrar during the first week of March. Both Republican Boards met on March 1, 1983, and reappointed Kilgore and McConnell. Later, the Democratic boards convened meetings and appointed Democrats to serve as general registrars. Because of this sequence of events, the Virginia General Assembly altered the statute to end an "outgoing" board's term on midnight, the last day of February.

The Democratic board members did not consider Kilgore and McConnell even though the boards knew Kilgore and McConnell wanted to retain their positions. In Kilgore's case, the Democratic members had not heard complaints on Kilgore's job performance.

Burchett worked as Lee County Assistant Registrar for more than four years. At the time the Democratically controlled Lee County Electoral Board failed to rehire McConnell, Virginia law did not require the term of the assistant registrar to coincide with the

general registrar's term. When the Democrat assumed the general registrar's office in Lee County, he advised Burchett that he did not consider her to be his employee. The Democratic registrar then hired the former chairman of the Lee County Democratic Party to serve as an unpaid assistant registrar. In a few months, the Democratic registrar hired a paid assistant whose husband served as a Democratic precinct worker.

After the wholesale firings, Kilgore, McConnell and Burchett filed suits under 42 U.S.C. § 1983 alleging the local electoral boards and the Lee County Registrar infringed on their first amendment rights of free speech and association. Jurisdiction was based on 28 U.S.C. § 1331.

Prior to the Democratic appointees assuming office, Kilgore and McConnell sought preliminary injunctions to restore them to office pending a trial on the merits. The district court denied the motion but certified the denial for an immediate

interlocutory appeal pursuant to 28 U.S.C. § 1292 (b). On April 1, 1983, the Fourth Circuit Judge Emory Widener heard this appeal and affirmed the district court denial. Judge Widener ruled that Kilgore and McConnell would receive their lost salary and benefits if they prevailed. The Commonwealth of Virginia opposed the injunction and did not object to this order. See C.P.A. at A-1. Relying on this precedent, Burchett did not seek preliminary injunction to remain assistant registrar pending a trial on the merits.

All three cases went to a jury during the summer of 1985. All three juries found that the defendants refused to reappoint the plaintiffs "solely because of [their] political affiliation." The juries awarded Kilgore and McConnell approximately $75,000 each and Burchett $40,000.

In the Kilgore trial, all past and current electoral board members and State Board of Elections Secretary Susan Fitz-Hugh

agreed that a democrat could do no better job than a republican as general registrar. In McConnell's trial, the Democratic members attempted to show other reasons for McConnell's removal. In its special verdict, the jury rejected these arguments. The Lee County board members also affirmed that a democrat could do no better job than a republican as general registrar. Similarly, in Burchett's case, the Democratic registrar testifed unequivocally that political party affiliation was unnecessary for the effective performance of the assistant registrar.

Coupled with the political "firings" were issues of the defendants' qualifed immunity, the Commonwealth's eleventh amendment assertion and the state or local employment status of county electoral boards and registrars.

In memorandum opinions, District Court Judge Jackson Kiser affirmed the juries' awards and findings. See Kilgore v. McClelland, 637 F. Supp. 1241 (W.D. Va.

1985); Burchett v. Cheek, 637 F. Supp. 1249 (W.D. Va. 1985). In reaching his decision, Judge Kiser relied on this Court's ruling in Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 57 (1980). Judge Kiser recognized that the individual defendants did not enjoy qualified immunity because they failed to recognize this Court's rulings in Elrod and Branti. Kilgore, 637 F. Supp. at 1247. On the qualified immunity issue, the defendants presented no evidence in the district court to support a claim that they made the Branti "inquiry".

In a subsequent memorandum opinion, Judge Kiser recognized that the county electoral board members were "state" rather than "local" employees. Kilgore v. McClelland, 637 F. Supp. 1253, 1258 (W.D. Va. 1986). Prior to his decision, Kilgore and McConnell argued that electoral board members were state and local employees. Among other things, the State Board of Elections

coordinates electoral boards and the registrar, but the locality provides office space and furnishes office supplies and equipment. However, the locality fixes and pays the salary of the assistant registrar. See Va. Code §§ 24.1-45 and 24.1-45.1.

Judge Kiser recognized that the eleventh amendment usually bars monetary damages against the Commonwealth. Because the Commonwealth had purchased insurance for its employees, Judge Kiser ruled that the plaintiffs could recover from the Commonwealth's insurance carrier.

From these memorandum opinions, an appeal to the Fourth Circuit Court of Appeals followed. The Fourth Circuit affirmed the district court's ruling on the political discharges and followed the Court's Elrod/Branti reasoning. McConnell v. Adams, 829 F.2d 1319, 1324 (4th Cir. 1987). Even though this Court decided Branti three years prior to the wholesale dismissals in these cases, the Fourth Circuit reversed the

district court and allowed the individual defendants qualified immunity. The Fourth Circuit affirmed the "state" employee status of electoral boards and registrars. The circuit court then ignored the insurance coverage provided by the Commonwealth and held the eleventh amendment barred any recovery against the defendants in their official capacity.

Kilgore, McConnell and Burchett sought reconsideration of the damages issue in the circuit court. A panel of the circuit court denied their petition for rehearing on November 19, 1987.

REASONS FOR GRANTING THE WRIT

I.

INCONSISTENCY AND INJUSTICE HAVE RESULTED FROM THE FOURTH CIRCUIT'S USE OF THE ELEVENTH AMENDMENT TO DENY MONETARY RELIEF IN A SITUATION WHERE PUBLIC FUNDS ARE NOT DIRECTLY INVOLVED AND THE STATE BEING SUED ACQUIESCED TO A COURT'S RULING THAT MONETARY RELIEF WOULD BE AVAILABLE TO MAKE KILGORE, McCONNELL AND BURCHETT WHOLE IF THEY PREVAILED.

The Fourth Circuit's denial of the monetary relief awarded to Kilgore, McConnell and Burchett by each of the respective juries created a miscarriage of justice to each of them but more importantly caused a lack of uniformity in that court's decisions in these cases and among other courts. Both Kilgore and McConnell sought a preliminary injunction to restore them to their respective jobs pending a trial on the merits. The United States District Court for the Western District of Virginia denied this motion but certified the denial for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On April 1,

1982, a single judge of the Fourth Circuit heard this appeal.

In denying the request for a temporary injunction, that court found that Kilgore and McConnell would not suffer irreparable harm because back pay was recoverable if they prevailed on the merits. None of the defendants including the Commonwealth of Virginia objected or voiced any disagreement to the court's ruling that:

> [t]here is also no arguable question that the plaintiffs may not be made whole for whatever rights they may have lost due to their employment, such as salary and fringe benefits, should they ultimately prevail. They can be reinstated to the office if they prevail and whatever salary and fringe benefits they may have lost can be restored to them by a monetary judgment.

C.P.A. at A-6.

Relying on this precedent, Burchett chose not to seek a preliminary injunction.

This ruling directly conflicts with the later decision of the Fourth Circuit denying the monetary relief because of the

Commonwealth's eleventh amendment immunity. McConnell, 829 F.2d at 1328. Not only has it created a lack of uniformity in these cases and within the Fourth Circuit, it also fails to consider other courts' recognition that the eleventh amendment does not bar monetary relief when the public treasury is not directly involved.

The protection of the eleventh amendment can be lifted either by congressional abrogation or a waiver by the state being sued. Edelman v. Jordan, 415 U.S. 651 (1974). While courts have usually required a clear intent of waiver, "[t]he rationale for construing a waiver narrowly is to protect the state treasury, and when a state is insured against the loss from a claim, that rationale is attenuated." West v. Keve, 571 F.2d 158, 164 (3rd Cir. 1978). In distinguishing Edelman, the court in West noted that the state had not procured insurance to cover the loss in Edelman. Consequently that court remanded West to the

district court to determine if the loss was insured and if so, whether that waived the eleventh amendment immunity. On remand, the district court found that under the facts of that case no waiver occurred. West v. Keve, 541 F. Supp. 534 (D. Del. 1982).

In the present cases, the Commonwealth of Virginia purchased insurance with Compass Insurance Company to cover the loss. Thus the payment of the monetary relief awarded by the juries would not affect the state treasury.

The question of whether the public treasury would be tapped has been the deciding factor for several courts. For example, in Brewer v. Cantrell, 622 F. Supp. 1320, 1323 (W.D. Va. 1985), the court found that Virginia's unemployment compensation fund was separate from all public monies; therefore, "[t]his protects the general funds of the public treasury from liability on suits on unemployment claims. The eleventh amendment bars suits which would cause funds

to be paid out of the general treasury of a state." For similar reasons, the Fourth Circuit in Foremost Guaranty Corp. v. Community Savings & Loan, Inc., 825 F.2d 1383 (4th Cir. 1987), distinguished itself from its decision in John Hanson Savings & Loan v. Maryland, 812 F.2d 1401 (4th Cir. 1987) (per curiam unpublished). In its analysis, the court noted:

> [i]n John Hanson, we held that sovereign immunity protected MDIF from suit by two savings and loan associations seeking redemption of certificates of deposit representing their capital contributions to MDIF's Central Insurance Fund. Had the plaintiffs been allowed to proceed in that case and had prevailed, the judgment would have operated directly to require the disbursement of public funds. These circumstances clearly invoke the bar of the eleventh amendment.

Foremost, 826 F.2d at 1388. However in Foremost, the court reached a different result because "[i]n this case [Foremost] where MDIF is sued in its capacity as a conservator of Community Savings and Loan, MDIF's administration of public funds is not

implicated." Foremost, 826 F.2d at 1388.

The emerging trend in the law is further illustrated by the court's decision in Bennett v. White, 671 F. Supp. 343 (E.D. Pa. 1987). That court allowed the plaintiffs to recover money that the officials of the Pennsylvania Department of Public Welfare had wrongfully withheld. The court found that "[w]hile the eleventh amendment bars the payment of interest to plaintiffs, it certainly does not preclude the payment to plaintiffs of their money which the defendants withheld improperly." Bennett, 671 F. Supp. at 349. Yet, other courts have determined that the presence of insurance does not always waive eleventh amendment immunity even though it might waive a state's sovereign immunity. Gamble v. Florida Department of Health and Rehabilitative Services, 779 F.2d 1509 (11th Cir. 1986); South Dakota Board of Regents v. Hoops, 624 F. Supp. 1179 (D.S.D. 1986). It is apparent that courts are split in their decisions

about the bar of the eleventh amendment especially when public monies are not directly involved.

Another factor which supports the proposition that the Commonwealth believed it had waived its eleventh amendment immunity when it purchased insurance is the position it took at the hearing on the preliminary injunction for Kilgore and McConnell. At that hearing, the Commonwealth urged the court to deny the injunction and never objected to the court's ruling that Kilgore and McConnell could be made whole with back pay if they prevailed

This Court held in Toll v. Moreno, 458 U.S. 1 (1981), that representations made by a university at a hearing to stay the trial court's order pending appeal waived the eleventh amendment immunity. The university had indicated that it would make refunds of tuition if it lost on appeal. Normally, the eleventh amendment would bar such refunds. Likewise in Barnes v. Bosley, 625 F.Supp. 81

(E.D. Mo. 1985), the court found a waiver resulting from the defendants' statement in a memorandum that "[w]ith respect to plaintiffs' income and benefits, as shown by plaintiffs' complaint, their alleged injury can be calculated and compensated by money damages if they were successful on a case on the merits." Barnes, 625 F. Supp. at 86.

Therefore, Kilgore, McConnell and Burchett submit that these decisions result in confusion about the application of the eleventh amendment when public monies are not directly involved and when, with the presence of insurance coverage, a state urges denial of temporary reinstatement to former jobs since restoration of salary and fringe benefits would ultimately be available through a monetary award. Not only has the Fourth Circuit been inconsistent in this case, its decision ignores the concerns and trends of other courts when public monies are not directly involved. This situation begs for clarification and ultimate resolution by

this Court.

II.

THE FOURTH CIRCUIT ACKNOWLEDGED THE LEGAL PRINCIPLE ESTABLISHED IN BRANTI BUT FAILED TO FOLLOW IT BY GRANTING QUALIFIED IMMUNITY TO AN EMPLOYER WHO DID NOT EVEN RECOGNIZE BRANTI AND PRESENT EVIDENCE THAT PARTY AFFILIATION WAS NECESSARY FOR EFFECTIVE JOB PERFORMANCE.

In discussing qualified immunity, the Fourth Circuit indicated that "[c]learly a reasonable public official should have known that Branti established a rule protecting employees from discharge solely for patronage reasons unless party affiliation is a relevant job requirement." McConnell, 829 F.2d at 1325. Despite this recognition that Branti established the rule, the Fourth Circuit granted qualified immunity.

The proper inquiry is not whether there are cases with similar facts or the same job at issue but whether a rule of law by which to judge the unconstitutional conduct has been established, recognized and followed by

the courts. Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 80 (1982). During the relevant time period, all courts utilized Branti as the test by which to judge patronage dismissals.

For example, in Ness v. Marshall, 660 F.2d 517, 522 (3rd Cir. 1981), the court upheld a political firing of a city solicitor because his responsibilities were "so intimately related to city policy, and therefore politics was a necessary requirement." While discussing Ness, the court in Visser v. Magnarelli, 530 F. Supp. 1165 (N.D.N.Y. 1982), did not sanction the firing of a city clerk because the evidence demonstrated the duties of the clerk were mostly technical and thus party affiliation was not an appropriate requirement for effective job performance. The same kind of inquiry was made by the court in Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981), when it stated that "[t]he test is whether the position held by the individual

authorizes, either directly or indirectly, meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation." Even the Fourth Circuit in Delong v. United States, 621 F.2d 618 (4th Cir. 1980), utilized the Branti test. The common thread in all of these cases is that they judged the evidence presented against the requirement of Branti to determine if party affiliation was a necessary job requirement.

The sequential process that should be followed in using the Branti test is illustrated by the decisions in Gibbons v. Bond, 523 F. Supp. 843 (W.D. Mo. 1981), and in Brady v. Paterson, 515 F. Supp. 695 (N.D.N.Y. 1981). In Gibbons, the court found that "[h]aving failed to persuade the court that the plaintiffs were not terminated wholly because of their political affiliation, the defendants, in order to prevail in this action, must demonstrate that

political affiliation is an appropriate requirement for the effective performance of the job...." Gibbons, 523 F. Supp. at 851. Likewise, in Brady, the court held that "[i]n order to make out a prima facie case, plaintiff must still establish that the defendants' decision to replace him ... was based solely on partisan political considerations .... At that point, the burden shifts to defendants to prove that party affiliation is an appropriate requirement for the effective discharge of the office...." Brady, 515 F. Supp. at 699.

Despite all of these decisions that existed when Kilgore, McConnell and Burchett were wrongfully discharged, the Fourth Circuit allowed qualified immunity because of some supposed "small office" exception to Branti. This exception never existed. If Branti is properly applied, no constitutional violation occurs when party affiliation is necessary for effective job performance.

That, however, must be proven by evidence in the case. In the present cases, all the testimony at each of the trials established that party affiliation was not necessary for effective job performance.

The Fourth Circuit acknowledged that "public officers should not automatically receive qualified immunity simply because there is not a strict factual nexus between their actions and the precedent establishing the right allegedly violated." McConnell, 829 F.2d at 1325. Yet, it appears that the court considered a factual nexus to be important because of its discussion of Ramey v. Harber, 589 F.2d 758 (4th Cir. 1978), and the "factual distinctions between large and small offices." McConnell, 829 F.2d at 1325. Neither the Fourth Circuit or the employer in these cases should rely upon Ramey since Branti was decided after Ramey.

The Fourth Circuit acknowledged the legal principle governing patronage

dismissals but failed to follow the principle when it granted qualified immunity. Such an aberration must not be allowed to stand.

III.

THE FOURTH CIRCUIT INCORRECTLY HELD THAT VOTER REGISTRARS AND ASSISTANT REGISTRARS ARE STATE EMPLOYEES BECAUSE THE VIRGINIA GENERAL ASSEMBLY ESTABLISHED A BIFURCATED SYSTEM WHERE BOTH STATE AND LOCAL GOVERNMENTS EXERCISE CONTROL.

The Fourth Circuit held that because electoral boards and registrars bear a closer nexus to the state than the locality these jobs are state positions. McConnell, 829 F.2d at 1327. The court failed to address the question of whether an assistant registrar is considered a state or local employee. Because the evidence showed that a bifurcated system existed with both local and state governments exercising control, the state's insurance carrier and the county's insurance carrier should be held jointly and severally liable for the constitutional deprivations.

On the state level, Va. Code § 24.1-46

establishes the ministerial duties of the registrar. McConnell, 829 F.2d at 1327. The salary of the registrar is set by the state and reimbursed to the localities. Also, the State Board of Elections may remove the registrar. Va. Code § 24.1-19.

On the local level, the locality furnishes office space and supplies for the general registrar. Va. Code § 24.1-43. The primary control that the locality possesses centers around the office of assistant registrar. Va. Code § 24.1-45 requires the local governing body to fix the amount and pay the compensation of assistant registrars. The registrar decides who fills the assistant registrar's post and ultimately who receives locality funding for that position. Each locality implements and supports the registrar's decision by signing the paycheck.

The Fourth Circuit applied an employer-employee test to determine whether

the state or locality had control. McConnell, 829 F.2d 1328. Public servants such as a registrar and assistant registrar do not fit so tightly into such a rigid test. Even though the Commonwealth may be the "employer", these public servants act on behalf of the local citizens.

The Virginia General Assembly established a bifurcated system where the registrar and assistant registrar are not entirely controlled at the state or local level even though the locality has more direct control over the assistant registrar. This Court should recognize the importance of both the state and the locality with respect to registrars and assistant registrars and hold both the state and locality jointly and severally liable for the constitutional deprivations.

CONCLUSION

For the foregoing reasons, Cross-Petitioners Kilgore, McConnell and Burchett respectfully pray that the Cross-Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 83-8076

WILLIE B. KILGORE — PLAINTIFF-APPELLANT

v.

SUSAN H. FITZ-HUGH, SECRETARY STATE BOARD OF ELECTIONS, et al — DEFENDANTS-APPELLEES

DORIS McCONNELL — PLAINTIFF-APPELLANT

v.

SUSAN H. FITZ-HUGH, SECRETARY STATE BOARD OF ELECTIONS, et al — DEFENDANTS-APPELLEES

O R D E R

This case is before me as a single judge in accordance with the provisions of FRAP 8 as an exceptional case due to the requirements of time.

The plaintiffs, Willie B. Kilgore and Doris McConnell, filed their action against

the counties of Scott and Lee in Virginia, the Secretary of the State Board of Elections, and the members of the Electoral Boards of the said counties, contesting the fact of their non-reappointment by the electoral boards of the said counties. They claim that they were not reappointed as registrars of the said counties solely due to their political beliefs. They are of the Republican persuasion, while the majority of the electoral boards of the said counties are of the Democratic.

They also claim they are entitled to the offices by virtue of state law.

State statutes of Virginia with respect to the state laws are at least confusing. They require electoral boards to meet in the first week of March 1983 and every four years thereafter to appoint general registrars. § 24.1-43. The terms of office, however, of one member of each of the electoral boards, which consist of three persons, expired March 1, 1983, and that member, a Republican,

joined with the remaining Republican member of each of the two boards on March 1, 1983 and reappointed the plaintiffs to the office of registrar of the respective counties. See § 24.1-29. Thereafter, a Democrat was appointed to each of the electoral boards to replace the Republican whose term expired on March 1st, and that member of the board, together with the other Democratic member, appointed new registrars. The question under state law is who is entitled to hold the office, the old registrars or the new. The State Board of Elections is empowered to supervise and coordinate the work of the county and city electoral boards and to make such rules and regulations as will be conducive to the proper functioning of such electoral boards. § 24.1-19. Its secretary has advised the new registrars that they are entitled to the office, and she has so advised the counties of Scott and Lee which pay the salaries of the registrars subject to reimbursement by the Commonwealth. In two

opinions of the Attorney General concerning this dispute, on March 24, 1983, he advised the secretary of the State Board of Elections that the new registrars are entitled to the office under state law. On March 30, 1983, the plaintiffs filed their suit in the district court. On March 31st, the State Board of Elections filed a declaratory judgment action in the circuit courts of Scott and Lee counties, seeking a determination of who was entitled to the office under state law. So far as I am advised, no action has been taken by the state court until this time.

The new registrars' term of office begins on April 1, 1983. § 24.1-44. On March 31, 1983, the district court declined to grant a temporary restraining order maintaining the old registrars in office, and certified its denial for interlocutory appeal under 28 U.S.C. § 1292(b).

The plaintiffs filed their notice of appeal, and this date have filed a petition for an interlocutory appeal under 28 U.S.C. §

1292(b). They ask this court to treat the denial of the temporary restraining order as a denial of a temporary injunction so that the denial may be appealed as a matter of right under 28 U.S.C. § 1292(a)(1), or, in the alternative, they press their petition for an interlocutory appeal. In either event, they ask me for an injunction pending appeal.

The district court treated, and I think properly, its denial of a temporary restraining order as not being an appealable order. Drudge v McKernon, 482 F.2d 1375 (1973). There are some cases I am aware of which have held the denial or granting of temporary restraining orders to be appealable, but each of them I have found has in effect disposed of the merits of the case or has been such an order or denial as would make the question moot or as would serve to permanently deprive the moving party of a right or inflict irreparable injury on the moving party.

There is no claim here that the question will be mooted by the denial of temporary relief. There is also no question made or possible that the merits of the case are effectively decided by such denial. There is also no arguable question that the plaintiffs may not be made whole for whatever rights they may have lost due to their employment, such as salary and fringe benefits, should they ultimately prevail. They can be reinstated to the office if they prevail and whatever salary and fringe benefits they may have lost can be restored to them by a money judgment.

Upon argument, the plaintiffs also claim irreparable injury in the mere failure to reappoint them because of their political beliefs, taking the position that their First Amendment rights not to be denied reappointment solely because of their political persuasion must be preserved intact.

Treating the appeal as from a denial of

a temporary injunction, which I do not think is proper, I would yet deny an injunction pending appeal because I do not believe that the plaintiffs have shown that it is more likely that they will succeed on appeal. Federal Leasing v. Underwriters at Lloyds, 650 F.2d 495, 499 (4th Cir. 1981). I also do not think the mere fact that the plaintiffs have been deprived of their office is enough to show irreparable harm to them when they may be reinstated in the office and obtain a money judgment for any pecuniary loss they may have suffered. The public interest, it is true, does require a continuous efficient operation of a registrar's office, and the plaintiffs say that the interruption and disruption caused by change of management is not in the public interest. Yet the plaintiffs do not claim that the new registrars will not register anyone entitled so to register or that anyone presently registered will be unlawfully removed from the registration books. That being true, I

think the management of the internal affairs of the office are up to the registrar subject only to any constitutional or statutory limitation. There is no likelihood of harm to the defendants if the temporary injunction is granted, for like the plaintiffs, I think they would be entitled to any pecuniary benefits they might have been deprived of by temporary relief.

While I do believe that the plaintiffs have an arguable case on the merits, the little likelihood of irreparable harm to them if temporary relief is denied, the fact that I consider the merits of the case to be an open questions under Elrod v. Burns, 427 U.S. 347 (1976), and the cases which have followed it, and the fact that I believe that the public interest has not been shown to be affected one way or the other to any great extent by the change in registrars, I believe the balance of hardship test of Blackwelder Furniture Company v. Seilig Manufacturing Company, 550 F.2d 189 (4th Cir. 1977), weighs

in favor of the defendants. The defendants are supported by administrative acts of the secretary of the State Board of Elections as well as an opinion of the Attorney General construing state law. While the matter of state law has not been decided by any court, the administrative acts of the state authorities administering the law and the Attorney General's opinion are entitled to some weight in my consideration. That being true, when I take into consideration the fact that I think the plaintiffs' right of action is at best an open question, I would deny the relief requested whether it be as an injunction pending appeal from the denial of a temporary injunction or from an injunction pending a discretionary appeal under 28 U.S.C. § 1292(b). I think it is of no moment that the district court was not applied to for temporary relief under FRAP 8 since it did not treat the order as appealable.

The parties will submit simultaneous memoranda with respect to whether or not an

interlocutory appeal should be granted, on or before April 8, 1983.

The plaintiffs were represented at this hearing by Gary Bradshaw, Esquire, Joseph Wolfe, Esquire, and William Hurd, Esquire. The counties and the electoral boards were represented by James P. Jones, Esquire, and the State Board of Elections was represented by Karen Gould, Esquire, who did not appear because her aircraft could not land at the local airports. She, however, gave her position in the case to me by telephone.

Each of the parties objected to all of the rulings I have made adverse to him for every reason which might be supported by the record.

It is accordingly ADJUDGED and ORDERED that an injunction pending appeal shall be, and the same hereby is, denied.

This 1st day of April, 1983.

/s/ H. E. Widener, Jr.
U. S. Circuit Judge

The plaintiff having been advised of the

contents of this order requested permission to withdraw their appeal and their petition for appeal, which was granted.

This 1st day of April, 1983.

/s/ H.E. Widener, Jr.
U. S. Circuit Judge

CONSTITUTION OF THE UNITED STATES
AMENDMENT XI
[RESTRICTION OF JUDICIAL POWER]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

VA. CODE § 24.1-19 - POWERS AND DUTIES IN GENERAL - The State Board of Elections shall so supervise and coordinate the work of the county and city electoral boards and of the registrars as to obtain uniformity in their practices and proceedings and legality and purity in all elections. It shall make such rules and regulations not inconsistent with law as will be conducive to the proper functioning of such electoral boards and registrars. It may institute proceedings for the removal of any member of the electoral board or other election official who fails to discharge the duties of his office in accordance with law. The Board may remove from office any registrar upon notice, who fails to discharge the duties of his office according to law. The Board may also file either a writ of mandamus or prohibition which writs will lie for the purpose of fulfilling the requirements of § 24.1-76 or § 24.1-165. (Code 1950, §§ 24-25, 24-345.11;

1952, c. 509; 1970, c 462; 1973, c 30; 1975,c 515.)

(2)

No. 87-1573

In The

Supreme Court of the United States

October Term, 1987

WILLIE B. KILGORE, DORIS McCONNELL AND PATSY BURCHETT,

Cross-Petitioners,

v.

COMMONWEALTH OF VIRGINIA, *ex rel.* STATE BOARD OF ELECTIONS, KATHERINE JONES McCLELLAND, FAYE OWENS, ROGER ADAMS, EVELYN BACON, PHILLIP CHEEK, the COUNTY OF LEE, VIRGINIA, the COUNTY OF SCOTT, VIRGINIA, the REPUBLIC INSURANCE COMPANY, and the COMPASS INSURANCE COMPANY,

Cross-Respondents.

OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

Whether the court of appeals correctly decided that monetary damages were not recoverable against the defendants in their official or individual capacities, because (1) the Commonwealth of Virginia had not waived its Eleventh Amendment immunity expressly or by implication, and (2) the law governing defendants' actions in March of 1983 was still evolving in all of its critical aspects, and could not be regarded as clearly established?

Whether this Court should certify to the Virginia Supreme Court the question of whether the defendants were employees of the state or the localities, where the court of appeals decision on this issue is clearly wrong, and is disrupting well settled state/local government relationships?

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No. 87-1573

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COMMONWEALTH OF VIRGINIA, *ex rel.* STATE BOARD OF ELECTIONS, KATHERINE JONES McCLELLAND, FAYE OWENS, ROGER ADAMS, EVELYN BACON, PHILLIP CHEEK, the COUNTY OF LEE, VIRGINIA, the COUNTY OF SCOTT, VIRGINIA, the REPUBLIC INSURANCE COMPANY, and the COMPASS INSURANCE COMPANY,

Cross-Respondents.

OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Cross-Respondents, the Commonwealth of Virginia, *ex rel.* State Board of Elections, and the Compass Insurance Company, (hereafter "Commonwealth") respectfully oppose the Cross-Petition of Willie B. Kilgore, Doris McConnell and Patsy Burchett, for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, for the following reasons.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions and any state statutes at issue here are reproduced in the text herein in the Cross-Petition for Writ of Certiorari, or in the Cross-Respondent Commonwealth's Petition for Certiorari docketed at 87-1424.

STATEMENT OF THE CASE

Virginia law provides that county general registrars shall be appointed by the local county electoral board to serve a four year term of office. Va. Code § 24.1-43. Virginia law also requires that the county electoral board shall consist of three members, a majority of whom "shall be from the political party which casts the highest number of votes in the Commonwealth for governor at the last preceding gubernatorial election." Va. Code § 24.1-29.

Doris McConnell and Willie Kilgore, both Republicans, were the general registrars respectively of Lee County and Scott County, in Virginia. Both were ap-

pointed in 1979 by majority Republican local electoral boards.

In January, 1982, Charles S. Robb, a Democrat, replaced Republican John S. Dalton as Governor of Virginia. With that change, the political composition of the local electoral boards changed because, as of March 1, 1983, as required by statute, the majority Republican boards were replaced by majority Democratic boards.

McConnell and Kilgore's terms were set to expire on March 31, 1983, but on March 1, 1983, the outgoing Lee and Scott County Republican boards conducted hastily convened meetings without notice to the new Democratic board members, in which they purported to reappoint McConnell and Kilgore to another four year term. Within a week, however, the newly constituted Democratic electoral boards met, and appointed Phillip Cheek and Glenda Duncan, both Democrats, as the new Lee and Scott County general registrars. All of these conflicting appointments were certified to the State Board of Elections, and the Secretary of the State Board sought state court declaratory review for a determination as to which appointees properly held office. State Circuit Judge Robert Stump ultimately held that the outgoing Republican boards were without authority to reappoint the registrars, and confirmed that Democrats Cheek and Duncan were the new duly appointed general registrars of Lee County and Scott County, Virginia.

McConnell and Kilgore then filed suits under 42 U.S.C. § 1983 in the United States District Court for the Western District of Virginia against the Commonwealth, Secretary of the State Board of Elections, and the new

Democratic members of the local electoral boards, (hereafter "defendants") claiming that the refusal to reappoint plaintiffs violated their First Amendment political speech and association rights as articulated by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 57 (1980) (hereafter "*Elrod/Branti* rule"). In addition, Patsy Burchett, a Lee County Assistant Registrar working for McConnell, was discharged by the newly appointed Cheek. She filed an identical suit against Cheek and Lee County.

Kilgore and McConnell initially applied for a preliminary injunction seeking reinstatement to their offices pending a trial on the merits. The district court denied the motion but certified the denial for an immediate interloctory appeal under 28 U.S.C. § 1292(b). In a hearing held on April 1, 1983, Circuit Judge Emory Widener, sitting as a single circuit judge, also denied the request for a preliminary injunction. Counsel for all parties *except* the Commonwealth of Virginia were present at this hearing. As Judge Widener stated in his opinion, Assistant Attorney General Karen Gould "did not appear because her aircraft could not land at the local airports. She, however, gave her position in the case to me by telephone." (C.P.A. - 10)[1] Judge Widener also noted that "each of the parties objected to all rulings I have made adverse to him . . ." (C.P.A. - 10).

On April 15, 1983, the Commonwealth filed a Motion to Dismiss the complaint on the ground, among others, that the action for damages was barred by the Eleventh

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[1]Reference is to the page number of the Appendix attached to the Cross-Petition.

Amendment to the United States Constitution. The plaintiffs thereafter voluntarily dismissed the Commonwealth as a defendant in the case, and proceeded against the named, individual defendants. From the outset, it was unclear whether the defendant local election officials were employees of the state, or of their localities, for purposes of insurance coverage and legal representation. Lee County and its insurer assumed coverage and provided legal representation from the start for the Lee County defendants, but Scott County denied coverage and refused representation. The Scott County defendants then brought a federal court declaratory judgment action against Scott County's insurer, Republic Insurance, for a ruling on whether Republic's policy provided coverage for the Scott County elections officials.

All of these cases were then assigned to District Judge Jackson Kiser, who conducted jury trials in the summer of 1985 in the McConnell, Kilgore and Burchett matters. The jury in each case was instructed to return a special verdict on the question of "whether defendants refused to reappoint plaintiff solely because of her political affiliation," and to fix damages, if any.

The jury found for the plaintiff in each case, and assessed damages at roughly $70,000 each for McConnell and Kilgore and $40,000 for Burchett. Post-trial motions were filed asserting, among other things, that political affiliation was an appropriate requirement for the position of general registrar, that the failure to reappoint plaintiffs was not equivalent to a discharge, and that the defendants were entitled to qualified immunity from personal liability for money damages. The Commonwealth

of Virginia appeared and argued as amicus on the post-trial motions. Judge Kiser rejected these motions, ordered the plaintiffs reinstated, and upheld the juries' verdicts for damages in an opinion issued in December, 1985. He reserved for further briefing, however, the question of how damages would be assessed, suggesting that the resolution of this issue was dependent upon whether the defendant board members/general registrar were state or local employees. At this time, the Commonwealth of Virginia intervened in the litigation as a party defendant, and again specifically preserved its entitlement to Eleventh Amendment immunity. The Commonwealth filed briefs and orally argued that these officials were local employees as a matter of state law, and were covered in their individual and official capacities under the localities' insurance policies. The counties of Lee and Scott appeared and contended that the defendants were state employees, while the plaintiffs argued that the defendants were in a "hybrid" category, and should be considered employees of both the state and the localities. Judge Kiser adopted the counties' arguments and in an opinion issued on April 28, 1986, declared the individual defendants to be state employees, and ordered the Commonwealth's carrier, Compass Insurance, to pay the judgments. The Commonwealth and the individual defendants timely appealed to the Fourth Circuit.

On appeal, appellants again asserted that political affiliation must be considered an appropriate requirement for the position of general registrar. In Virginia, the general registrar is the sole employee chosen by the board. Appellants argued that any political animosity or antipathy would create an untenable work situation between

the general registrar and local electoral board with the result that the interrelationship and functioning of the personnel in this small office would be strained. Appellants asserted that the Virginia legislature adopted a statutory scheme for the appointment of general registrars which permitted local boards to consider party affiliation as a criterion for the position for this reason. The appeals court rejected these contentions, finding that the state legislative appointment scheme did not mandate partisan appointments for registrars and in any event, that the possibility of political antipathy in a small office could no longer be regarded as a legitimate exception to the *Elrod/Branti* rule. The court therefore affirmed the district court's grant of injunctive relief reinstating the plaintiffs to their offices.

Appellants also argued that the district court erred in holding the defendants to be state officials, where the overwhelming weight of state statutes, administrative decisions, and state and federal judicial authority made clear that these local elections officials were considered employees of the localities in which they served. The court of appeals did not follow these state law mandates, however, and instead adopted its own, novel, "nexus to the governmental entity" formula to find that the defendants were employees of the state.

Finally, the court of appeals reversed the district court's award of damages to the plaintiffs, holding that the law relating to political discharges was not "clearly established" at the time of the employment actions in this case. Because the defendants were entitled to qualified immunity in their individual capacities, and were protected

by Eleventh Amendment immunity in their official capacities as state employees, they could not be held liable for damages.

The appellees' Petition for Rehearing In Banc, seeking reconsideration of the damages issues, was denied by a panel of the court of appeals on November 19, 1987. The Commonwealth filed its Petition for Writ of Certiorari on February 17, 1988. This cross-petition followed.

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REASONS FOR DENYING THE WRIT

A. THE ANALYSIS BY THE COURT OF APPEALS REGARDING THE STATE'S ELEVENTH AMENDMENT IMMUNITY FAITHFULLY FOLLOWS THIS COURT'S PRECEDENTS AND IS ENTIRELY CONSISTENT WITH THE DECISIONS OF OTHER COURTS OF APPEAL

The court of appeals held that the individual defendants were state officials, and concluded that monetary damages could not be recovered against them in their official capacities because of the bar of the Eleventh Amendment. This conclusion is in accord with prior decisions of this Court. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974).

The cross-petitioners argue, however, that the Eleventh Amendment should not apply here because (1) the Commonwealth has "acquiesced" in an assessment of monetary damages against state officials in this case, and (2) because the Commonwealth has "waived" its Eleventh Amendment immunity by procuring insurance coverage for its public officials who are sued in their individual ca-

pacities. Neither of these contentions merit plenary consideration by this Court.

1. The Commonwealth has not acquiesced to an assessment of monetary damages against state officials in this case.

The "acquiescence" argument is not supported by the law or the facts. Cross-petitioners assert that the Commonwealth waived its Eleventh Amendment immunity because it did not specifically object to language in the opinion and order of Judge Emory Widener, sitting as a single circuit judge, denying plaintiff's request for a preliminary injunction on the ground, among others, that lost wages would not constitute irreparable harm. This contention is ludicrous. The record establishes that the Assistant Attorney General for the Commonwealth was not even present at the hearing in which that opinion and order was issued "because her aircraft could not land at the local airports." (C.P.A.—10). Further, even if Judge Widener's order could somehow be construed as a ruling adverse to the Commonwealth's Eleventh Amendment immunity, such ruling would be deemed objected to, because, as Judge Widener stated: "Each of the parties objected to all the rulings I have made adverse to him for every reason which might be supported by the record." (C.P.A. —10).

Cross-petitioners' attempt to liken this case to the factual situations in *Toll v. Moreno,* 458 U.S. 1 (1981), and *Barnes v. Bosley,* 625 F.Supp. 81 (E.D. Mo. 1985), is without merit. In *Toll,* this Court found an affirmative representation by University counsel, which was incorporated in writing in two court orders, that tuition refunds

would be provided if the University lost on appeal. 458 U.S. at 17-18. Similarly, in *Barnes*, counsel represented in a written memorandum of law that plaintiffs could be "compensated by money damages if they were successful on a case on the merits." 625 F.Supp. at 86. There were no such affirmative representations by the Commonwealth in this case, or any representations at all for that matter that the Commonwealth would consider itself obligated to afford damages relief to the plaintiffs.

In any event, from the outset of this litigation, the Commonwealth of Virginia consistently has asserted that any recovery of monetary damages is barred against the state and her agents acting in their official capacities by the doctrine of Eleventh Amendment immunity. *See Motion to Dismiss, Kilgore/McConnell v. Fitz-Hugh, et al.*, No. 83-0090-B, ¶ 4, filed April 15, 1983; *Motion to Dismiss or for Summary Judgment, Burchett v. Cheek, et al.*, No. 85-0065-B, ¶ 7, filed April 19, 1985; Motion to Intervene as a Party Defendant, *Kilgore/McConnell Burchett, supra*, ¶ 8, filed January 6, 1986. No argument can be made that the Commonwealth has waived its Eleventh Amendment immunity by any action it has taken in this litigation. Plenary consideration of this question therefore is simply not warranted.

2. The Commonwealth did not waive its Eleventh Amendment immunity when it procured liability insurance to protect its employees sued in their individual capacities

Cross-petitioners do not contest the finding of the court of appeals that there are no Virginia statutes which

can be construed to express the clear legislative intent necessary to render the state liable in damages in federal court for the acts of its officials. They argue, instead, that the courts are in conflict whether the bar of the Eleventh Amendment applies when insurance is available to cover the loss, and assert that this Court should clarify the issue. There is no such conflict.

The federal courts which have addressed this question have uniformly concluded that the purchase by a state of insurance coverage to protect state officials who are sued in their personal capacities does not establish a waiver of Eleventh Amendment immunity. *See, e.g., Gamble v. Florida Dept. of Health and Rehab. Services,* 779 F.2d 1509, 1516-17 (11th Cir. 1986); *Thames v. Oklahoma Historical Society,* 646 F.Supp. 13, 14-15 (W.D. Okla. 1985), *aff'd,* 809 F.2d 699 (10th Cir. 1987); *Smith v. Town of Dewey Beach,* 659 F.Supp. 752, 756 (D. Del. 1987); *South Dakota Bd. of Regents v. Hoops,* 624 F.Supp. 1179, 1184 (D. S.D. 1986); *Griess v. State of Colorado,* 624 F.Supp. 450, 453 (D. Colo. 1985); *West v. Keve,* 541 F.Supp. 534, 537 (D. Del. 1982).

The cases asserted by cross-petitioners as illustrating an alleged conflict do not even relate to a state's procurement of insurance. In *Foremost Guarantee Corp. v. Community Savings & Loan, Inc.,* 826 F.2d 1383 (4th Cir. 1987), the court found that the Maryland Deposit Insurance Corporation was sued in its private capacity as the receiver of a private institution, and therefore was not an alter ego of the state. *Bennett v. White,* 671 F. Supp. 343, 349 (E.D. Pa. 1987), dealt with injunctive relief requiring the return to the plaintiffs of child support monies which had

been wrongfully confiscated by the state. And in *Brewer v. Cantrell*, 622 F.Supp. 1320 (W.D. Va. 1985), the court's observation that unemployment compensation monies constituted a "special fund" was dictum unnecessary to the court's holding that defendants were entitled to summary judgment on the merits. Clearly, there is no confusion in the law regarding the effect of a state's procurement of liability insurance which requires clarification by this Court.

Moreover, as a public policy matter, a holding that the existence of insurance coverage by a state vitiated Eleventh Amendment immunity would effectively preclude states from being able to obtain any liability coverage at all. This could have the effect of discouraging qualified individuals from seeking public service employment. Indeed, the so-called liability insurance crisis has already left many states, including Virginia, unable to obtain insurance. States have been forced to establish their own "self-insurance" programs which are funded through the public treasury.

As a practical matter, it should be noted that insurance policies have a wide variety of conditions and limitations on coverage. A holding that Eleventh Amendment immunity was abrogated to the extent of available insurance coverage would require the federal district courts in suits against a state to engage in a case by case analysis of insurance policies, coverages, limits and reserves just to determine whether jurisdiction attached in the first instance. Clearly such a result ought to be avoided.

The Commonwealth submits that there is no conflict among the circuits regarding the effect of liability insurance on a state's Eleventh Amendment immunity, and as-

serts that such an approach to federal court jurisdiction would be detrimental as a matter of public policy. For these reasons, the writ should be denied.

B. THE COURT OF APPEALS CORRECTLY FOUND THAT THE DEFENDANTS WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW GOVERNING THEIR ACTIONS IN MARCH OF 1983 WAS NOT CLEARLY ESTABLISHED

This Court's decisions make clear that public officials are not required to anticipate the extension of legal principles or the clarification of constitutional rights. *Mitchell v. Forsythe*, 472 U.S. 511, 534-35 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is also especially true that the law respecting patronage personnel decisions has in the past and remains today fraught with exceptions, unsettled and controversial. The court of appeals noted in *Jones v. Dodson*, 717 F.2d 1329, 1333 (4th Cir. 1984), a political patronage case decided after the conduct at issue here, that "controlling doctrine, both substantive and procedural, is still evolving and is by no means yet authoritatively settled in all its critical aspects." *See also*, more recently, *De Abadia v. Mora*, 792 F.2d 1187, 1193 (1st Cir. 1986) ("In some cases, the application of *Elrod/Branti* may be clear; in other it will be sufficiently fraught with uncertainty that an official could not be faulted for failing to apprehend"); *Hartley v. Fine*, 780 F.2d 1383, 1388 (8th Cir. 1985) (Qualified immunity granted where there was a question whether the dismissed official was employed in a policymaking or non-policymaking position).

In this case, the court of appeals correctly found that in March of 1983, there was a significant body of case law

holding that small government offices were exempted from the *Elrod/Branti* rule. In *Ramey v. Harber,* 589 F.2d 758 (4th Cir. 1978), a case arising out of Lee County, Virginia, the home county of the defendants in this case, the court found that the factual distinctions between large and small office situations, and the greater likelihood that political animosity might thwart governmental functions in a small office, "raise[d] a question as to the applicability of *Elrod.*" 589 F.2d at 757. Judge Hall, concurring, emphasized that the small size of the office made *Elrod* inapplicable. 589 F.2d at 761. Moreover, at the time of the defendants' actions in this case, a number of other courts embraced this same small office exception to *Elrod/Branti. See McBee v. Jim Hogg County,* 703 F.2d 834, 841-42 (6th Cir. 1983); *Horton v. Taylor,* 585 F.Supp. 224, 227-28 (W.D. Ark. 1984); *Dove v. Fletcher,* 574 F. Supp. 600, 604-05 (W.D. La. 1983). In *Jones v. Dodson, supra,* the Chief Judge of the United States District Court for the Western District of Virginia relied on the small office exception in granting judgment notwithstanding the verdict in litigation involving the Page County, Virginia, sheriff's department. It was not until his decision was reversed by the court of appeals, well after the defendants' actions here, that the validity of the small office exception was called into question. *Jones v. Dodson, supra,* 727 F.2d at 1338. In light of this substantial body of law, a reasonable public official in the defendants' position could have concluded that a refusal to re-employ plaintiffs in a small government office would not have violated their constitutional rights.

It should also be noted that the defendants in this case were not experienced public officials, but included

an elementary school math teacher, a widow employed by a printing company, a Head Start Program director, and a grocer, all who had been serving only for a few days when they were required to make a decision about appointing new registrars and an assistant registrar. It cannot seriously be contended that these persons should have anticipated the future demise of the small office exception. Indeed, to hold that the law was clearly established under the factual circumstances of this case would require from these defendants a better understanding of constitutional law than that shown at that same time by the Chief Judge of the United States District Court for the Western District of Virginia. Clearly, our law governing qualified immunity would not countenance such an absurd result.

For these reasons, the court of appeals was correct in holding that the law governing defendants' conduct was not clearly established at the time of the defendants' actions in this case, and that the defendants were entitled to qualified immunity from damages liability in their individual capacities. Accordingly, there is no need for plenary consideration of this issue by this Court.

C. THE COURT OF APPEALS' HOLDING THAT LOCAL ELECTION OFFICIALS ARE STATE EMPLOYEES HAS CREATED A NOVEL AND UNSUPPORTED EXCEPTION TO STATE LAW, AND IS DISRUPTING WELL SETTLED STATE/LOCAL GOVERNMENT RELATIONSHIPS.

The Commonwealth does not dispute cross-petitioners' contention that the court of appeals incorrectly decided the question of whether the individual defendants were

employees of the state or of the localities. However, the Commonwealth has raised this issue in its own Petition for Certiorari docketed in this Court on February 17, 1988, *Commonwealth of Virginia ex rel. State Board of Elections v. Willie B. Kilgore, et al.*, No. 87-1424, and respectfully moves this Court to grant the relief requested therein.

———o———

CONCLUSION

For the foregoing reasons, the cross-petition for writ of certiorari should be denied.

Respectfully submitted,

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OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI OF KILGORE, McCONNELL AND BURCHETT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether this Court should decline to review the construction of a state statute agreed upon by both lower courts, where the validity of the statute is not in question, but only its applicability to the unique facts of this case?

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Cross-Respondents.

OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI OF KILGORE, McCONNELL AND BURCHETT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents Republic Insurance Company and Scott County respectfully oppose the Cross-Petition to this Court filed by Willie B. Kilgore, Doris McConnell and Patsy Burchett for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit for the following reasons.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent state statutes at issue here are reproduced in the Commonwealth of Virginia's Petition for a Writ of Certiorari in *Commonwealth of Virginia ex rel. State Board of Elections* v. *Kilgore, et al.*, No. 87-1424, filed February 17, 1988 ("Case No. 87-1424").

STATEMENT OF THE CASE

Respondents respectfully adopt and incorporate by reference the Statement of the Case in their Opposition to the Commonwealth of Virginia's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in Case No. 87-1424.

To the extent the Cross-Petition raises one new issue with regard to Patsy Burchett, the Assistant Registrar of Lee County, these Respondents take no position as that is a matter soley between Burchett, Lee County and the Commonwealth of Virginia.

REASONS FOR DENYING THE WRIT

THIS IS NOT THE RARE AND EXCEPTIONAL CASE IN WHICH THIS COURT SHOULD REVIEW A CONSTRUCTION OF STATE LAW AGREED UPON BY THE TWO LOWER FEDERAL COURTS, ESPECIALLY WHEN THE LOWER COURTS' INTERPRETATION OF THE STATUTE IS REASONABLE.

In Cross-Petitioners' third Question Presented, they raise the issue of whether the United States Court of Appeals correctly held that, under the circumstances presented to it, voter registrars and assistant registrars were employees of the Commonwealth of Virginia. However, it is noteworthy that Cross-Petitioners: 1) do not challenge the lower court's finding that electoral board members in the counties are employees of the Commonwealth; and 2) limit the discussion of the issue in their Brief to the assistant registrar of Lee County.[1]

To the extent Cross-Petitioners challenge the ruling of the Fourth Circuit in *McConnell* v. *Adams*, 829 F. 2d 1319 (4th Cir. 1987), *affirming in pertinent part*, *Kilgore* v. *McClelland*, 637 F. Supp. 1241 (W.D. Va. 1985), *Burchett* v. *Cheek*, 637 F. Supp. 1249 (W.D. Va. 1985) and *Kilgore* v. *McClelland*, 637 F. Supp. 1253 (W.D. Va. 1986), Respondents incorporate herein by reference pp. 5-10 of their Brief in Opposition to the Commonwealth of Virginia's Petition for

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[1]Cross-Petitioner Patsy Burchett, Assistant Registrar of Lee County argues, "The [lower] court failed to address the question of whether an assistant registrar is considered a state or local employee." Cross-Petition, p. 26.

Certiorari in Case No. 87-1424. The argument therein demonstrates the correctness of the decisions of the two lower courts that under Virginia law, registrars and board members in the counties are employees of the Commonwealth of Virginia.

Since no "plain error" or an "unreasonable" interpretation of state law is argued by Cross-Petitioners with regard to the employment status of registrars or board members in the counties, review by this Court is not necessary or appropriate. *See Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499, 500 n.9 (1985).

To the extent Cross-Petitioner Patsy Burchett argues that she, as assistant registrar of Lee County, was a county employee under the Fourth Circuit's ruling, these Respondents take no position, as the issue does not pertain to them. However, it would appear that Cross-Petitioners do not challenge the test applied by the Fourth Circuit; they just do not agree with the result.

CONCLUSION

The lower courts were correct in their rulings that registrars and electoral board members in the counties were employees of the Commonwealth of Virginia.

Respectfully submitted,

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and
SCOTT COUNTY, VIRGINIA

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No. 87-1573

In The

Supreme Court of the United States

October Term, 1987

WILLIE B. KILGORE, DORIS McCONNELL and PATSY BURCHETT,
Cross-Petitioners,

v.

COMMONWEALTH OF VIRGINIA, *ex rel.* STATE BOARD OF ELECTIONS, KATHERINE JONES McCLELLAND, FAYE OWENS, ROGER ADAMS, EVELYN BACON, PHILLIP CHEEK, the COUNTY OF LEE, VIRGINIA, the COUNTY OF SCOTT, VIRGINIA, the REPUBLIC INSURANCE COMPANY and the COMPASS INSURANCE COMPANY,
Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF ROGER ADAMS, EVELYN BACON, PHILLIP CHEEK and COUNTY OF LEE, VIRGINIA TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED HEREIN BY WILLIE B. KILGORE, DORIS McCONNELL and PATSY BURCHETT

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QUESTIONS PRESENTED

Where the critical day-to-day regulation and control of the conduct of a rural county electoral board and registrar's office lies with the state and not the county, are the electoral board members and the general registrar state or are they county employees?

When the state legislatively predetermines and actively directs the conduct of its electoral board and general registrar in a small rural county and steadfastly asserts that the appointment procedure of that same electoral board and general registrar is fully legal and falls squarely within the political affiliation exception to *Branti/Elrod,* can the individual electoral board members' and general registrar's conduct be defined as malicious or negligent disregard of clearly-established constitutional rights?

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No. 87-1573

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Cross-respondents, Roger Adams, Evelyn Bacon, Phillip Cheek and the County of Lee, Virginia, do not think a writ of certiorari should be granted. This brief in opposition is filed pursuant to Supreme Court Rule 22. The

cross-petition was received by Adams, Bacon, Cheek and the County of Lee, on March 21, 1988.

REFERENCE TO OPINIONS

Cross-respondents, Roger Adams, Evelyn Bacon, Phillip Cheek and the County of Lee, Virginia refer this Court to the same opinions and orders designated on page 2 of the Commonwealth of Virginia's original petition in case no. 87-1424.

JURISDICTION

The order of the court of appeals denying cross-petitioners' petition for rehearing and suggestion for rehearing en banc was entered on November 19, 1987. (Petition of Commonwealth of Virginia, A-25). This Court may take jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent constitutional provisions and state statutes at issue here are reproduced as Appendix D at A-70 of the appendix to the original petition filed in case no. 87-1424 by the Commonwealth of Virginia, as Appendix A-13 to cross-petitioners' brief and as Appendix A-1 to the

Adams, Bacon, Cheek and Lee County brief in opposition in case no. 87-1424. There is in addition Code of Va. §§ 24.1-23, -31, and -34 reproduced as Appendix A at page A-1 of the appendix of this brief in opposition.

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STATEMENT OF THE CASE

A Judge of the Thirtieth Judicial Circuit of the Commonwealth of Virginia appointed Evelyn Bacon to the Lee County Electoral Board in October 1981 and on February 28, 1983, appointed Roger Adams to his position on the Lee County Electoral Board. A democrat won the Governor's race in November 1982, and consequently, by operation of Virginia law, the majority of the members of the Lee County Electoral Board for the term beginning March 1, 1983, were democrats. Va. Code § 24.1-29. Susan Fitz-Hugh, Secretary of the State Board of Elections, in February 1983, instructed Evelyn Bacon, member and secretary of the Lee County Electoral Board, to meet and appoint a Lee County General Registrar during the week of March 1, 1983. The Lee County Electoral Board met during the week of March 1, 1983 and appointed Phillip Cheek as Registrar for Lee County. Roger Adams and Evelyn Bacon, the two democrats on the Board, cast their votes in favor of appointing Phillip Cheek. Judy Carol Williams, the republican member of the Board, thought being given notice, did not appear at the meeting. When two people claimed to be the new registrar, Susan Fitz-Hugh, Secretary of the State Board of Elections, immediately instituted and proceeded to conclusion a suit in Scott

County and a suit in Lee County to determine the correct appointment.

After the appointment of Phillip Cheek as Lee County General Registrar, but before the date Phillip Cheek took office (April 1, 1983) Susan Fitz-Hugh of the State Board of Elections directed Lee County Electoral Board member Evelyn Bacon to personally request incumbent Lee County General Registrar Doris McConnell to train Phillip Cheek. Doris McConnell refused to do this.

Again under specific instructions from Susan Fitz-Hugh, Secretary of the Commonwealth of Virginia State Board of Elections, Lee County Electoral Board Member Evelyn Bacon along with local law enforcement officials and in-coming General Registrar Phillip Cheek removed a window and entered into the office of the Lee County General Registrar at midnight of March 31, 1986, to secure the Lee County Registrar's Office for the in-coming General Registrar, Phillip Cheek. Incumbent Registrar Doris McConnell considered that she still held the office and would not relinquish the keys.

The State Board of Elections through its Secretary, Susan Fitz-Hugh, gave any instructions that were given to the Lee County Electoral Board.

The legislature in Richmond and not the Lee County Board of Supervisors determines, pays and regulates the compensation of the Lee County Electoral Board members of the Lee County General Registrar. Although the paychecks come from Lee County, the Commonwealth of Virginia completely reimburses the amounts paid. Lee County must provide office space-and some supplies (though not forms) as well as some fringe benefits.

Prior to taking office on April 1, 1983, in-coming General Registrar Phillip Cheek talked with Susan Fitz-Hugh, Secretary of the State Board of Elections, about his new job. He inquired about Patsy Burchett. Susan Fitz-Hugh told Cheek that he could appoint whom he wanted; that Patsy Burchett's term was the same as incumbent Registrar Doris McConnell's and thus ended with Doris McConnell's term on March 31, 1983.

The State Board of Elections in Richmond, Virginia actively controlled and still controls the daily activities of the Lee County General Registrar and Assistant General Registrar. All materials used at the polls and almost all the materials used in the Registrar's Office come from the State Board of Elections' Office in Richmond. The form of the ballot comes from Richmond. Precinct rosters, the central roster system, the master voter roster, and the voter list all are created and produced in Richmond. If there are any irregularities in the operation of the office of General Registrar, they are to be reported to the State Board of Elections and the local Board. In the cases at hand, any irregularities were reported to Susan Fitz-Hugh or the State Board of Elections. The computer is in Richmond. The role of the local Registrar is to check the accuracy of the computer printouts, but the State Board of Elections' computer in Richmond automatically and exclusively performs the annual voter purge. The General Registrar reports often and regularly to Richmond but only on the mail dates set by Richmond. Whenever the

General Registrar or the Assistant General Registrar has a problem, he or she calls Richmond, the State Board of Elections. All the daily duties of the General Registrar and the Assistant General Registrar are spelled out in the Registrar's Handbook, which the Secretary of the State Board of Elections has prepared. It is that handbook "that you go by for everything you do in the Registrar's Office." All duties are spelled out. There is to be no variance. The officials of the State Board of Elections train the county's General Registrar and Assistant General Registrar. The State Board of Elections sets the hours of operation. Between the law, which sets forth the duties of the General Registrar and the Assistant General Registrar, and the handbook, which sets out the everyday tasks, there is no room for discretion and the General Registrar and the Assistant General Registrar make no policy decisions. Lee County General Registrar Phillip got 100% of his instructions from Richmond.

———o———

REASONS FOR DENYING CROSS-PETITIONERS' WRIT

The cross-petition for certiorari should not be granted. The Fourth Circuit in this case is correct on the issues of Eleventh Amendment immunity, qualified immunity and status as state employees. Adams, Bacon, Cheek and the County of Lee in this brief in opposition shall respond only to the issues of qualified immunity and employee status.

I.

WHERE THE CRITICAL DAY-TO-DAY REGULATION AND CONTROL OF THE CONDUCT OF A RURAL COUNTY ELECTORAL BOARD AND REGISTRAR'S OFFICE LIES WITH THE STATE AND NOT THE COUNTY, THE ELECTORAL BOARD MEMBERS AND THE GENERAL REGISTRAR ARE STATE AND NOT COUNTY EMPLOYEES.

A.

It Is The General Assembly Of The Commonwealth Of Virginia And Not The Board Of Supervisors Of Lee County That Has Actively And Consistently Implemented A Pre-Programed Partisan Statutory Scheme Of General Registrar And Assistant General Registrar Appointments.

Only the State Board of Elections, not the Lee or Scott County Board of Supervisors of the Lee or Scott County Electoral Board, is authorized by statute to make rules and regulations, to remove a member of the local Electoral Board, or to file either a writ of mandamus or a writ of prohibition. Under Va. Code § 24.1-19.

> The State Board of Elections shall so supervise and coordinate the work of the county and city electoral boards and of the registrars as to obtain uniformity in their practices and proceedings and legality and purity in all elections. It shall make such rules and regulations not inconsistent with law as will be conductive to the proper functioning of such electoral boards and registrars. It may institute proceedings for the removal of any member of an electoral board or other election official who fails to discharge the duties of his office in accordance with law. The Board may remove from office any registrar upon notice, who fails to discharge the duties of his office according to law. . . .

The Virginia legislature has not only given the State Board of Elections the power to direct and supervise Virginia elections but also has mandated a central record-keeping system in Richmond. Va. Code § 24.1-23.

The legislative scheme is clear: Policy, procedure, rules, regulations, supervision, enforcement, discipline and records are all under the direct supervision of the State Board of Elections dominated by members of the party who won the last governor's race.

How and who to make the registrar appointments was first predetermined by a uniform constitutional and legislative scheme and second was personally directed by the Secretary of the State Board of Elections Susan Fitz-Hugh. She personally advised when the appointments would take place, how to physically secure the office for Phillip Cheek, whether Phillip Cheek had to keep incumbent Assistant Registrar Patsy Burchett, and she instituted proceedings in Circuit Court to determine the actual Registrar of Lee and of Scott Counties. This hand-on direction and implementation of a predetermined patronage oriented statutory scheme is totally directed from Richmond, Virginia and not the county seat of Lee or Scott Counties four hundred (400) miles to the west.

B.

The "Moving Force" Was Clearly The Legislature And The State Board Of Elections.

When fairly and objectively viewed, it is obvious that the public entity which was the "moving force," *Kentucky v. Graham,* 473 U.S. 159, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985), behind any unconstitutional deprivation of plaintiffs' rights was neither Scott nor Lee County, but the

Commonwealth of Virginia through its General Assembly and its State Board of Elections. No matter how the citizens of these localities would vote in any election, the political composition of the local electoral board which in turn appoints the general registrar (who in turn appoints the assistant registrar) is determined by the statewide outcome of the gubernatorial election; not by the vote in Lee or Scott County. Va. Code § 24.1-29. Therefore, no matter what the local electorate did and no matter what a local governing body could do, an unconstitutional deprivation would arise because of the State statutory scheme. The citizens of Lee and Scott County whether through the ballot box or through their governing body could not have prevented the injury. It is wrong to hold them accountable for its infliction.

C.

Neither The County's Governing Body Nor Its Electorate Has Any Say In Appointing, Supervising Or Controlling Electoral Board Members, Registrars, or Assistant Registrars.

As is readily seen in examining the Virginia Constitution and statutes, a locality has absolutely no expressly granted or necessarily implied authority to influence, persuade or control either the State's circuit court judge in appointing the electoral board, or the electoral board in appointing, removing or discharging the general registrar, or the general registrar in appointing or removing an as-

sistant registrar. Va. Code § 24.1-29, and -32. Furthermore in all matters of personnel such as selection and appointment, setting of qualifications, determination of amount of salary or compensation, and the removal or discharge of the electoral board members and the general registrar, the locality also has no control or influence—all these matters are reserved to the General Assembly and the State Board of Elections. Va. Code § 24.1-19, -29, -31, -32, -34, and -43: *McConnell v. Adams*, 829 F.2d 1319, 1326-28 (4th Cir. 1987). It is true that the assistant general registrar is paid by the county unreimbursed by the Commonwealth. Apart from pay, however, all rules, regulations, daily advice, control and supervision is from either the State Board of Elections or the general registrar.

The cross-petitioners recognized this pervasive State control in their complaints which initiated this litigation. The complaints alleged a deprivation under color of the law and of the customs and usages of the State of Virginia —not under the law and policy of the locality. *See*, Count I, Paragraphs 7 and 8 (Kilgore and McConnell complaints) and Count I, Paragraphs 10 and 11 (Burchett complaint).

Moreover, cross-petitioners Kilgore and McConnell pointed out in their district court briefs in support of motions for reinstatement to the job of general registrar, filed July 23, 1985, at page 4:

> . . . The control by the State Electoral Board points to one conclusion—a registrar serves the State and not a particular county electoral Board.

D.

He Who Makes Should Bear The Burden.

If, as the jury in these cases found, the sole motivation for the appointments was political party affiliation (patronage), then the individuals who made those appointments were simply carrying out clearly intended state constitutional, legislative and executive patronage policies. It was the decision makers in the legislative and executive branches in Richmond who had the final authority to perpetuate patronage in the appointment of the registrars or to curtail patronage appointments in those offices. The legislative and the executive branch in Richmond decided to perpetuate and fortify the role of patronage in the appointments of electoral board members, registrars and assistant registrars. It is logical, lawful and ultimately fair that the legislative and executive branches of the government of the Commonwealth of Virginia, and not the Electoral Board members and general registrars of Lee and Scott Counties, Virginia should bear full responsibility for the allegedly improper patronage appointments which allegedly occurred.

II.

WHEN THE STATE LEGISLATIVELY PREDETERMINES, AND ACTIVELY DIRECTS THE CONDUCT OF ITS ELECTORAL BOARD AND GENERAL REGISTRAR IN A SMALL RURAL COUNTY AND STEADFASTLY ASSERTS THAT THE APPOINTMENT PROCEDURE OF THAT SAME ELECTORAL BOARD AND GENERAL REGISTRAR IS FULLY LEGAL AND FALLS SQUARELY WITHIN THE POLITICAL AFFILIATION EXCEPTION TO BRANTI/ELROD, THE INDIVIDUAL ELECTORAL BOARD MEMBERS' AND GENERAL REGISTRAR'S CONDUCT CANNOT BE DEFINED AS MALICIOUS OR NEGLIGENT DISREGARD OF CLEARLY-ESTABLISHED CONSTITUTIONAL RIGHTS

A.

Lee County Electoral Board Members And The General Registrar Followed The Instructions Of Their Employer On The Proper And Legal Way To Make Their Appointments

Bacon, Adams and Cheek acted in utmost good faith. They had no reason to know that their appointments violated clearly established constitutional rights. Secretary of the Commonwealth of Virginia State Board of Elections, Susan Fitz-Hugh, personally instructed them on the legal propriety of the appointments. After the appointments the same Secretary of the Commonwealth of Virginia Board of Elections immediately brought declaratory judgment actions in Lee and Scott Counties, Virginia to insure the propriety of the general registrar appointments. The Secretary of the Commonwealth of Virginia Board of Elections and the Commonwealth itself have steadfastly asserted in the district Court, the Fourth Circuit and

now here in this Court, wherein it is petitioner (Case No. 87-1424), "that political considerations play a necessary role in the employment of general registrars in Southwest Virginia (Petition in case no. 87-1424 at page 8)[1]

When the individual defendants in these cases simply acted in furtherance of a long entrenched constitutionally and legislatively created patronage system, then the responsibility for following that scheme should fall on the shoulders of the Commonwealth of Virginia "rather than the several agents who were trying to perform their job." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 89 L.Ed.2d 452, 470, 106 S. Ct. — (1986). The General Assembly of the Commonwealth of Virginia has expressly accepted this responsibility. Prior to 1986 the General Assembly accepted the responsibility because it set in motion the patronage oriented statutory scheme. In 1986 it enacted Va. Code § 2.1-526.8(E) establishing a state public officials' liability insurance plan which specifically provides coverage for electoral board members and registrars "for acts or omissions of any nature while acting in an authorized governmental or proprietary capacity and in the course and scope of employment or authorization. . . ."

The Fourth Circuit has ruled that Bacon, Adams and Cheek are in this set of facts entitled to qualified immunity

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[1]As phrased in the September 30, 1986 joint brief of appellants in the Fourth Circuit, the Commonwealth of Virginia asserts:

> Even if the personnel actions below were considered *Elrod/Branti* patronage discharges, there is a sufficient public interest justification because the Virginia General Assembly has made a legislative determination that political affiliation is essential to the effectiveness of the general registrar and her assistants. (Joint brief of appellants at page 36.)

(829 F.2d 1319, 1325). Not only did defendants, Bacon, Adams and Cheek act upon and in accordance with the counsel given by the Commonwealth of Virginia State Board of Elections but "(r)oughly contemporaneous with these actions, other courts . . . recognized a small office exception to *Elrod/Branti.*" *Id.* at 1325. Finally, the record will show that Cheek conferred with legal counsel in the process of deciding not to appoint Patsy Burchett.

B.

Cross-Petitioners Suggest Cases Which Do Not Support Their Contentions.

The cases discussed by cross-petitioners on pages 22 through 26 of their brief lead to no other conclusion on qualified immunity than that handed down by the Fourth Circuit. *Brady v. Paterson,* 515 F.Supp. 695 (N.D.N.Y. 1981), *Delong v. United States,* 621 F.2d 619 (4th Cir. 1980), *Ness v. Marshall,* 660 F.2d 517 (3rd Cir. 1981) and *Visser v. Magnarelli,* 530 F.Supp. 1165 (N.D.N.Y. 1982) are all inapposite. The courts in these cases never got to the issue of qualified immunity.

Gibbons v. Bond, 523 F.Supp. 843 (W.D. Mo. 1981) and *Nekolny v. Painter,* 653 F.2d 1164 (7th Cir. 1981) are "qualified immunity" cases but they do not make out the cross-petitioners' case. In *Gibbons* the Court *granted* "qualified immunity" and emphasized the difficulty involved:

> ". . . [t]he determination of whether a particular position in state government is protected by the First Amendment presents a difficult factual question." Id. at 854.

In *Nekolny* a republican supervisor discharges three New York township employees because they had actively and *vocally* campaigned against her. *Nekolny* was denied a qualified immunity defense. There was in *Nekolny* no evidence that the supervisor's conduct was directed, condoned and vigorously defended in state and federal courts by her employer as strictly complying with established constitutional law. Nor was there in *Nekolny* a contention of the continued viability of the small office exception to *Branti/Elrod.*

C.

Adams, Bacon And Cheek Continue Resolute That Their Appointments Were Made With The Correct Motivation

Finally, and really to Adams, Bacon and Cheek most importantly, even though the evidence did not convince the trial court jury, the record is full of evidence that their major if not sole motivation in making the respective registrar and assistant registrar appointments was the conviction that neither Doris McConnell nor her close friend and associate Patsy Burchett were able or willing to do a competent job as their appointee.

———o———

CONCLUSION

Bacon, Adams and Cheek tried to be responsible public servants. Their jobs were defined, regulated and actively controlled by the Secretary of the State Board of Elections of the Commonwealth of Virginia. The Secretary actively advised Bacon, Adams and Cheek what to do

in the appointment process of cross-petitioners Doris McConnell and Patsy Burchett. The Secretary followed up the appointments with two actions in state court, two actions in federal district court, a consolidated case in the Fourth Circuit and an original petition in this Court to ratify and perpetuate both the system by which and the manner in which Bacon, Adams and Cheek made the general registrar and the assistant general registrar appointments.

The Fourth Circuit carefully and correctly decided these cases. It is time Adams, Bacon and Cheek, who long ago resigned from this kind of public service because of this kind of litigation, be released from the burden of this case, a burden the Commonwealth of Virginia wants and alone should bear.

Respectfully submitted,

ROGER ADAMS,
EVELYN BACON,
PHILLIP CHEEK
and
COUNTY OF LEE, VIRGINIA

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APPENDIX

Article 2

Central Registration Roster

§ 24.1-23. Establishment; duties of State Board of Elections.—The State Board of Elections shall provide for the establishment, operation and maintenance of a central record-keeping system on or before October 1, 1973, for all voters registered in the Commonwealth.

In order to establish, operate and maintain such system, it shall be the duty of the State Board of Elections to:

(1) Maintain a complete central registration roster of all qualified voters in the Commonwealth by county or city, as the case may be, and by precincts within such county or city.

(2) Delete from the central registration roster the name of any voter (a) who is deceased, (b) who is no longer qualified to vote in the election district where registered due to removal of his residence, (c) who has been convicted of a disqualifying crime, or (d) who is otherwise no longer qualified to vote as may be provided by law.

(3) Enter names of qualified voters on the central registration roster as they are reported by the general registrars.

(4) At least ten days prior to a general or primary election and three days prior to a special election, provide to each general registrar a list of all registered voters in the county or city, together with an alphabetical list of all registered voters in each precinct of such county, city or town, which precinct lists shall be used as the official

lists of qualified voters and constitute the precinct registration books.

(5) Retain for four years from date of receipt all information furnished to the Board relating to the inclusion or deletion of names from the master roster.

(6) Acquire by purchase, or lease, or contract for the use of such equipment as is required to execute the duties of the Board properly.

(7) Utilize any source of information which may assist in carrying out the purposes of this section.

(8) Furnish, at a reasonable price, precinct lists for their districts to courts of the Commonwealth and the United States for jury selection purposes, to candidates for election or political party nomination to further their candidacy, political party committees or officials thereof for political purposes only, incumbent officeholders to report to their constituents, nonprofit organizations which promote voter participation and registration for that purpose only; and for no other purpose and to no one else. In addition, any general registrar whose records of registered voters are automated may furnish such lists to courts of the Commonwealth and the United States for jury selection purposes. Precinct lists shall be by printout or by magnetic tape to be used on computer equipment as may be requested.

Any person receiving such precinct lists shall take and subscribe to the following oath:

"I understand that the lists requested are the property of the State Board of Elections of the Commonwealth of Virginia (or name of appropriate county or city) and

I hereby affirm that I am a person authorized by § 24.1-23 of the Code of Virginia to receive a copy of the precinct lists described; and I further affirm that the lists will be used only for the purposes prescribed and for no other use, and that I will not permit the use or copying of such lists by persons not authorized by the Code of Virginia to obtain them."

(Seal) Signature of Purchaser.....

(9) Reprint and impose a reasonable charge for the sale of reprints of Title 24.1 of the Code of Virginia or portions thereof, precinct lists, copies of lists of names of persons voting at general elections, statements of election results by precinct, and any other items required of the Board by law. Receipts from such sales shall be credited to the State Board of Elections for reimbursement of printing expenses.

(10) Furnish to candidates, elected officials or political party chairmen and to no one else on request, at reasonable cost, lists of those who voted at any primary or general election held in the two preceding years. Any person receiving such lists shall take and subscribe to the oath set forth in paragraph (8) of this section. (1970, c. 462; 1971, Ex. Sess., c. 119; 1972, c. 620; 1973, c. 30; 1974, cc. 369, 428; 1975, c. 515; 1976, c. 616; 1978, c. 778; 1983, c. 348.)

§ 24.1-31. Compensation and expenses of members.—Each member of the electoral board shall receive an annual compensation for his services a sum in accordance with the compensation plan set forth in the general appropriations act.

The counties and cities shall furnish the necessary postage and stationery, including a bound book for the minutes of its proceedings, for the use of the board.

Each member of the electoral board shall receive from the county or city, respectively, the same mileage as is now paid to members of the General Assembly.

Each member of the electoral board, including the secretary, shall receive the compensation set forth in the general appropriations act and, before he is entitled to receive any other amount in accordance with the expense plan set forth in the general appropriations act, shall make out a statement under oath of his claim for mileage and expenses, and the statements, when so made out and found correct, shall be paid by the governing body of the county or city for which the board was appointed and for which the service was rendered or expense incurred. Each governing body shall be reimbursed annually for such sums from the state treasury to the extent of (i) such compensation, (ii) not more than $300 for costs incurred in the conduct of the electoral process, including expenses of the secretary of the electoral board, and (iii) mileage paid to members of the electoral boards, all to the extent as may be appropriated by law.

The governing body of any county or city may determine and pay to the secretary of the electoral board such additional allowance for expenses as it deems appropriate, and may determine and pay to the full-time secretary of the electoral board such additional compensation as they deem necessary, which additional expenses and compensation shall not be reimbursed from the state treasury. (Code 1950, §§ 24-37, 24-38, 24-40, 24-41; 1952, c. 540; 1956, c. 658; 1958, c. 42; 1964, c. 515; 1966, c. 714; 1970, c. 462;

1972, c. 620; 1974, c. 428; 1978, c. 778; 1981, c. 425; 1982, c. 650.)

§ 24.1-34. Board may remove general registrar or officers of election; filling vacancy in office of general registrar.—The board may remove from office any general registrar or officer of election upon notice, who fails to discharge the duties of his office according to law.

The electoral boards shall have the power, and it shall be their duty to declare vacant, and to proceed to fill the office of any general registrar in their respective cities and counties if he fails to qualify and deliver to the secretary of the board the official oath of the appointee in the usual form within thirty days after he has been notified of his appointment which notification shall be promptly given by the secretary. (Code 1950, §§ 24-35, 24-36; 1970, c. 462; 1984, c. 480.)